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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~291.~~ 94

ANN KITTREDGE, WIDOW AND ADMINISTRATRIX OF E. E. KITTREDGE, DECEASED, AND TUTRIX OF THE MINOR HEIRS OF SAID E. E. KITTREDGE, PLAINTIFF IN ERROR,

VS.

OLIVIA C. RACE AND HER HUSBAND, GEORGE W. RACE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED 20th OCTOBER, 1873.

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1 UNITED STATES OF AMERICA.

Circuit court of the United States, fifth circuit and district of Louisiana.

MRS. OLIVIA C. RACE, WIFE, AND GEORGE W. Race, her husband,
vs.
MRS. ANN E. KITTREDGE, ADM'TR'X.
} No. 6799.

Petition and interrogatories on facts, & articles and order.—Filed Aug. 16th, 1872.

To the hon. the judge of the circuit court of the United States for the fifth circuit and district of Louisiana.

The petition of Mrs. Olivia Corinne Kittredge, wife of George W. Race, and of said George W. Race, authorizing and assisting his said wife, both citizens of the State of Mississippi, domiciliated at Pass Christian, in said State of Mississippi, with respect, represents that she is one of four surviving children, legitimate issue of the marriage of Dr. E. E. Kittredge with her mother, who died many years since, leaving some property for petitioner and her co-heirs. Her father, said Dr.
2 E. E. Kittredge, qualified as natural tutor of his said minor children, as such took possession of their property inherited as aforesaid. That subsequently he contracted a second marriage, and a number of children have been born of that marriage. That on or about the 10th day of February, 1862, said Dr. E. E. Kittredge, in his capacity as tutor, made a settlement with petitioner for the amount then due her from her mother's estate, and then executed and delivered to her therefor, which she now holds and owns, his two promissory notes, both drawn by him to his own order and by him endorsed, both dated New Orleans, February 12th, 1862, and both payable on the 27th of March, 1863, for the sum of seven thousand eight hundred and fifty-nine $\frac{80}{100}$ dollars ($7,859.80) each, and both bearing 8 per cent. per annum interest until paid. On each of said notes are the following endorsements, viz: "Interest paid up to 27th March, 1866." "Interest paid up to 27th March, 1867." "Interest paid up to 27th March, 1868." "February 3rd, 1869, rec. on this note from Mrs. Ann E Kittredge, administratrix, &c., two thousand five hundred dollars." Said two notes are filed
3 herewith and to be taken as a part hereof.

That said first three payments of interest were made by said Dr. E. E. Kittredge in person, and the last two were paid each for one year's interest in advance, and that the other credit was a partial payment made at the date thereof by Mrs. Ann E. Kittredge, a citizen of the State of Louisiana, in her capacity of administratrix, &c., of the succession of her deceased husband, said Dr. E. E. Kittredge, who died on the 19th of October, 1867; and his succession was opened in the probate court for the parish of Assumption, Louisiana, with said Mrs. Ann E. Kittredge, the widow in community and tutrix of their minor children, as administratrix thereof, and that she, in her capacity aforesaid, from and after the death of said Dr. Kittredge, many times acknowledged the correctness of said two notes and the liability of said succession to pay them.

That the payment made on account of said notes by her, as aforesaid, was put on the first provisional account filed by her on the 9th
4 July, 1869, in said succession, as follows: "Feb'ry 3rd, 1869, suc-

succession paid by Bogart to G. W. Race, on account of his wife's claim, five thousand dollars, ($5,000,) which account was homologated, and that said notes were further acknowledged for the balance due thereon by said Mrs. Ann E. Kittredge, in her several capacities of widow in community, natural tutrix of her minor children, and administratrix, as aforesaid; and all the major co-heirs of petitioner, in a document by public act, passed before N. A. Pintado, recorder and ex-officio notary public, on the 21st of March, 1870, purporting to be a compromise between the widow in community, tutrix, and all the heirs, except petitioner, to said succession; wherein, among other things and divers illegal stipulations, speaking of the balance due your petitioner on said promissory notes, the following acknowledgment is made, viz:

"And now, as a basis of settlement of the interest of said parties of the first part in and to the succession of said Dr. E. E. Kittredge,
5 and as a mode of liquidating, paying, and settling the same, it is hereby covenanted and agreed, first, that the following debts due by the succession of said Dr. E. E. Kittredge shall be assumed and placed at the charge of the parties of the second part, and the said parties of the second part warrant and guarantee said parties of the first part against all liabilities from the same, viz, "a debt of about eleven thousand dollars, due Olivia Corinne Race, balance due her from her mother's succession."

Petitioner further represents that, just prior to the death of said Dr. E. E. Kittredge, in the fall of 1867, he told his wife and children that he owed the amount of the two notes aforesaid; that the interest thereon had been paid by him up to the following March, and exacted a promise from them to pay said notes out of the then growing crop of sugar-cane; and that these facts were communicated to petitioner by said Mrs. Kittredge a number of times during the years 1867 and 1868.

6 Petitioner further represents that, at the date of said five thousand dollars payment, made by Mrs. Kittredge aforesaid, and after allowing the proper credit therefor, one-half on each of said notes, viz, on the 3rd February, 1869, there was a balance still due on said two notes of eleven thousand seven hundred and $\frac{51}{100}$ dollars, at interest according to the face of said notes, at 8 per cent. per annum.

Petitioner further represents that she desires the answer of said Mrs. Ann E. Kittredge, in her capacities of widow in community, tutrix, and administratrix, &c., as aforesaid, to the subjoined interrogatories on facts and articles.

Wherefore, the premises considered, petitioner prays for petition and citation against Mrs. Ann E. Kittredge, as widow in community, tutrix, and administratrix, &c., as aforesaid, that she be ordered, in her several capacities aforesaid, to answer, under oath and within the legal delay, the subjoined interrogatories on facts and articles, and, finally, for a judgment against her in her several capacities aforesaid, and
7 against said succession of Dr. E. E. Kittredge, for the amount of said two notes, say the sum of eleven thousand seven hundred and eighty-eight dollars, with eight per cent. interest thereon from the 3rd day of February, 1869, until paid, and for all costs, and for general and equitable relief and remedy, the nature of the case may require, and law and equity will warrant.

(Signed) W. H. FOSTER AND E. T. MERRICK,
Attys.

Interrogatories on facts and articles to be propounded to, and answered under oath by, Mrs. Ann E. Kittredge, in her capacity of widow in community, tutrix, and administratrix, &c., within the legal delay.

Interrogatory 1st. Did not Dr. E. E. Kittredge, your late husband, some time in the year 1867, or at any other time, and when, say to you that he owed his daughter, this plaintiff, her hereditary share in her mother's succession, for which she held his notes, and on which he had paid the interest up to the following March, and request and
8 charge you to pay her the amount of said notes as soon after his death as possible; and did you not communicate these facts to petitioner and her husband a number of times during the years 1867, 1868, and 1869? If not, what did he say on this subject, and what did you repeat to them or either of them, as having been said on that subject by said Dr. Kittredge? State fully.

(Signed) W. H. FOSTER &
E. T. MERRICK,
Attys.

I hereby authorize my wife to institute this suit and to sign any papers and bonds necessary to prosecute a writ of error to the Supreme Court of the United States, should it become necessary.

(Signed) G. W. RACE.

Order.

Ordered, that Mrs. Ann E. Kittredge, widow in community, tutrix, and administratrix, the within-named defendant, answer under oath within the legal delay the interrogatories herein propounded to her as prayed for.

August 13th, 1872.

(Signed) W. B. WOODS, *Judge.*

9 *Copy of notes sued on.—Filed August 20th*, 1872.

$7,859.80.] NEW ORLEANS, *February 12th*, 1862.

On the 27th of March, 1863, I promise to pay to the order of myself seven thousand and eight hundred and fifty-nine $\frac{80}{100}$ dollars, for value received, with eight per cent. interest.

(Signed) E. E. KITTREDGE.

On the above are the following endorsements, viz:

"E. E. Kittredge."

"Interest paid up to 27th March, 1866."

"Rec. on within note interest up to 27th March, 1867. (Signed) G. W. R.

"Rec. interest on within note up to 27th March, 1868.

"Rec., Febr. 3rd, 1869, on this note from Mrs. Kittredge, administratrix, two thousand five hundred dollars, ($2,500.)

$7,859.80.] NEW ORLEANS, *February 12th*, 1862.

On the 27th of March, 1863, after date, I promise to pay to the order of myself seven thousand eight hundred and fifty-nine $\frac{80}{100}$ dollars, value received, with eight per cent. interest. Due 27th March, 1863.

(Signed) E. E. KITTREDGE.

10 On the above are the following endorsements, viz:

"E. E. Kittredge."

Int. paid up to 27th March, 1866.

Rec. on within note interest up to 27th March, 1867. (Signed) G. W. R.

Rec. interest on within note up to 27th March, 1868.

Rec'd, Feb. 3rd, 1869, from Mrs. Kittredge, administratrix, on this note, two thousand five hundred dollars, ($2,500.)

The above is a true copy of the notes and endorsements thereon.

(Signed) G. W. RACE.

Plea of prescription.—Filed Nov. 14th, 1872.

Circuit court of the United States, district of Louisiana.

MRS. OLIVIA C. RACE AND HUSBAND
vs.
ANN E. KITTREDGE. } No. 6799.

And now comes the defendant herein, by J. R. Beckwith, her atty., and in her character as administratrix of the succession of E. E. Kittredge, deceased, and tutrix of his minor heirs, and for exception to the said demand of said plaintiff saith:

1st. That the said alleged demand of the said plaintiff and the
11 supposed promissory notes in said petition set forth and described are prescribed by the lapse of five years, and pleads the statute and prescription of five years, and avers that if at any time the said plaintiff had any right of action on said supposed promissory notes, that the same is lost by said prescription, and no longer exists in said plaintiff.

2d. That the said plaintiff, in a certain suit in equity now depending in the court, wherein the plaintiff herein is complainant, and that defendant and other heirs of the said E. E. Kittredge, deceased, are defendants, has in her said bill of complaint prayed for a decree against said defendant herein for the same identical demand set forth in her said petition herein, which said cause in equity is still depending and undetermined in this court, being No. 6801 of the docket of this court.

Wherefore, and by reason of the premises, said defendant prays judgment that the said plaintiff's petition be dismissed, and for
12 judgment against the said plaintiff with costs.

(Signed) J. R. BECKWITH,
Atty. for Defdt.

Answer.—Filed November 14th, 1872.

Circuit court of the United States, district of Louisiana.

MRS. OLIVIA C. RACE & HUSBAND
vs.
ANN E. KITTREDGE, ADMINISTRATRIX, &C. } No. 6799.

And now comes the said defendant, by J. R. Beckwith, her attorney, and in her character as administratrix of the succession of E. E. Kittredge, deceased, tutrix of his minor heirs, for answer to said plaintiffs' petition, in the event that the several exceptions by her in her character and capacity aforesaid hereinbefore pleaded be overruled and not otherwise, for answer to said plaintiff's petition denies all and singular the allegations therein set forth and contained, and prays for judgment against the said plaintiff with costs.

(Signed) J. R. BECKWITH,
Atty. for Deft.

13 *Answer to interrogatories.—Filed November 14th, 1872.*

Circuit court of the United States, district of Louisiana.

MRS. OLIVIA RACE & HUSBAND
vs.
ANN E. KITTREDGE, ADMINISTRATRIX, &C. } No. 6799.

And now comes the said defendant, by J. R. Beckwith, her atty., and herewith files her answer to the interrogatories on facts and articles in the petition herein, subject always to the following exceptions, that is to say: the said defendant saith that the said plaintiffs' petition and all of the matters therein contained do not warrant or authorize any order requiring the defendant to answer said interrogatories; that the same are illegal, and that the said answers thereto are inadmissable as evidence in this cause as tending to establish any action or right of action alleged to be due from the succession of the said E. E. Kittredge, or to show, or tend to show, any causes, reconventions, or interruption of prescription.

14 Wherefore said defendant prays that the court will adjudge the said interrogatories improper and illegal, and the said answer of the said defendant inadmissable as evidence in the cause.

(Signed) J. R. BECKWITH,
Atty. for Defdt.

United States circuit court, fifth circuit and district of Louisiana.

MRS. O. C. RACE, WIFE, AND G. W. RACE
vs.
MRS. ANN E. KITTREDGE, ADMINISTRATRIX. } No. 6799.

For answer to the interrogatories on facts and articles, propounded to her by plaintiff in the above entitled and numbered suit, the said defendant, Ann E. Kittredge, in her capacity as widow in community, tutrix, and administratrix, being duly sworn, says: I think it was in the summer of 1867, about the month of July, when my late husband, Dr. E. E. Kittredge, said to me that he owed his daughter, the plaintiff in this suit, fifteen thousand dollars. He did not state what he owed that sum for. He did not say that his daughter, the plaintiff in this

15 suit, held his notes, and that he had paid interest on them to the following March.

He did not request or charge me to pay her the amount of said notes, or any other amount, as soon after his death as possible or at any other time. I stated to the plaintiff and to her husband also, during the year 1867, I believe, and also in 1868, to the best of my recollection, that my late husband had said to me that he owed her fifteen thousand dollars; and that is all I stated to them.

(Signed) ANN E. KITTREDGE,
Administratrix.

Sworn to & subscribed before me this 2d day of November, 1872.

(Signed) DÉSIRÉ LE BLANC,
Parish Judge.

Peremptory exception.—Filed November 14th, 1872.

Circuit court of the United States, district of Louisiana.

MRS. OLIVIA C. RACE AND HUSBAND
vs.
MRS. ANN E. KITTREDGE, ADMINISTRATRIX. } No. 6799.

16 And now comes the said defendant, Ann E. Kittredge, sued herein as widow in community of the late E. E. Kittredge, deceased, and as tutrix of the minor heirs and administratrix of the succession of the said deceased, and severing in her defence in the said several characters and capacities in which she is in this action impleaded, by J. R. Beckwith, her attorney, as peremptory exception to the said plaintiff's petition, in so far as the same relates to or refers to said defendant as widow in community and seeks to enforce such alleged demand against her in said capacity or individually, says that said plaintiff ought not to further have and maintain her said action against this defendant, for, she says:

1st. That all and singular the allegations in said plaintiff's petition set forth, if true as therein pleaded and set forth, (which this defendant in no wise admits,) do not disclose and set forth any right of recovery against this defendant personally or as widow in community, or disclose in any manner any right of action against this defendant, or any in-

17 debtedness of this defendant to said plaintiff, or in any manner liable to the said plaintiff for her alleged distribution share of the succession of the matter of said plaintiff.

2d. That if said plaintiff ever had or possessed any right of action against said defendant in any other capacity than as administratrix of the succession of the said E. E. Kittredge, deceased, the same is prescribed by the lapse of five years: wherefore she pleads prescription of five years.

3rd. That the said plaintiff, in a certain suit in equity now depending in this hon. court, wherein the plaintiff herein is complainant and this defendant and others, heirs of the said E. E. Kittredge, deceased, are defendants, has in her bill of complaint prayed a decree for the same identical demand set forth in her said petition herein against this defendant and her said co-defendants, heirs of the said E. E. Kittredge, which said cause in equity is still depending and undetermined in this court, being No. 6801 of the docket of this court:

Wherefore she prays judgment whether said plaintiff ought

18 further to have and maintain her said action against this defendant individually or as widow in community, and that her said demand against this defendant be dismissed with costs.

(Signed) J. R. BECKWITH,
Atty. for Deft.

Affidavit and order for plff. to testify on trial hereof.—Filed March 17th, 1873.

In the U. S. circuit court.

MRS. OLIVIA C. RACE, WIFE OF G. W. RACE,
vs.
ANN E. KITTREDGE, WIDOW IN COMMUNITY, tutrix, and administratrix. } No. 6799.

George W. Race, being first duly sworn, says it is important and ma-

terial, and it is necessary, that justice may be done between the parties to this suit, that this court should order the plaintiff to testify as a witness in this case on the trial hereof.

(Signed) G. W. RACE.

Sworn to and subscribed before me this 17th March, 1873.

(Signed) K. LOEW, *U. S. C.*

19 *Order.*

Considering the act of Congress approved March 3rd, 1865, it is ordered that the plaintiff be authorized to give her testimony in this case.

March 17th, 1873.

(Signed) E. H. DURELL, *Judge.*

Waiver of jury.—Filed May 13th, 1873.

Circuit court.

MRS. OLIVIA C. RACE & GEORGE W. RACE
vs.
MRS. ANN E. KITTREDGE, ADMX., AND AS tutrix. } No. 6799.

In this case the parties agree to waive the jury, and that the case shall be tried by the court.

May 13th, 1873.

(Signed) W. H. FOSTER AND E. T. MERRICK, *for Plff.*

(Signed) J. R. BECKWITH, *Atty. for Defdt.*

20 *Hearing and submission of cause—Extract from minutes, April term, 1873.*

NEW ORLEANS, *Tuesday, May 13th,* 1873.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

OLIVIA C. RACE
vs.
ANN E. KITTREDGE & AL. } No. 6799.

This cause came up for trial by the court, the parties having filed a stipulation waiving the jury—E. T. Merrick for plaintiff, J. R. Beckwith for deft.—when, after hearing the pleadings, evidence, and counsel, the court took time to advise.

Judgment from judgment-docket, April term, 1873.

NEW ORLEANS, *Monday, June 9th,* 1873.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, dist. judge.

MRS. O. C. RACE
vs.
MRS. A. E. KITTREDGE, ADMX., &C. } No. 6799.

21 The law and the evidence being in favor of the plaintiff, Mrs. Olivia C. Race, it is ordered, adjudged, and decreed by the court

that the plaintiff's demand be recognized as prayed for, and that the plaintiff do have and recover judgment against the said Mrs. Ann E. Kittredge in her said capacity of administratrix of the succession of Ebenezer E. Kittredge, deceased, for the sum of ($11,788.50) eleven thousand seven hundred and eighty-eight $\frac{50}{100}$ dollars, with eight per cent. interest per annum thereon from the 3rd day of February, 1869, until paid, with all costs of this suit, and to be paid out of the assets belonging to said succession in her hands for administration; and that said Mrs. Ann E. Kittredge, in her individual capacity and as widow in community bound for one-half of said debt and interest, do pay the said plaintiff one-half part of said debt and interest, viz: The sum of five thousand eight hundred and ninety-four $\frac{25}{100}$ dollars, ($5,894.25) and interest thereon at eight per centum per annum from February 3rd, 1869, until paid;
22 and that there also be judgment against said minors, Lucy E. Kittredge and Carrie Kittredge, Iola Kittredge & Oena Kittredge, with benefit of inventory of their virile shares of said debt, the one-eleventh part of the remaining half, with 8 per centum interest thereon from said 3rd of Feb'y, 1869, each, and against all said defendants in solido for all costs, it being understood that there is to be but one satisfaction for the whole sum and interest herein first aforesaid.

Judgment rendered June 9th, 1873.
Judgment signed June 13th, 1873.
(Signed) E. H. DURELL, *Judge.*

Motion for writ of error.—Extract from minutes. June 19th, 1873.

MRS. OLIVIA C. RACE
vs.
MRS. A. E. KITTREDGE, ADMINISTRATRIX. } No. 6799.

On motion of J. R. Beckwith, atty. for defdt., it is ordered that a writ of error, returnable to the Supreme Court of the United States at its next regular term, be allowed the said defendant, and that the same operate as a supersedias, upon the said defendant furnishing bond
23 with securities, conditioned as the law directs, in the sum of $18,300, the same to be filed within the delay allowed by law, and to be approved as to solvency by the clerk of this court.

Petition and order for writ of error—Filed September 2d, 1873.

Circuit court of the United States, district of Louisiana.

MRS. OLIVIA C. RACE
vs.
ANN E. KITTREDGE, WIDOW, ADMINISTRATRIX, &c. } No. 6799.

To the honorable Joseph B. Bradley, associate justice of the Supreme Court of the United States.

The petition of Ann E. Kittredge, widow, and administratrix of the succession and interest of the minor heirs of E. E. Kittredge, deceased, respectfully shows unto your honor that on the 13th day of June, A. D. 1873, Mrs. Olivia Race, aided and assisted by George W. Race, her husband, obtained a judgment against your petitioner and against

24 the minor heirs of the late E. E. Kittredge, in the circuit court of the United States for the district of Louisiana in the above-entitled cause, for the total sum of eleven thousand seven hundred and eighty-eight $\frac{50}{100}$ dollars, with 8 % interest per annum thereon from 3rd February, 1869, until paid, and all costs.

That said judgment was rendered by the Hon. E. H. Durell, U. S. district judge, during the last term of said court; that the defendant, your petitioner, and her sureties, resided at considerable distance from the city of New Orleans, where said court was held, and before a bond to operate as a supersedeas of said judgment could be executed the said district judge had departed from the district of Louisiana, and the Hon. W. B. Woods, circuit judge, had also departed from the said fifth circuit, and was at Newark, in the State of Ohio.

That within the first ten days from and after the rendition of said judgment your petitioners sued out a writ of error from said judgment and returnable to the next term of U. S. Supreme Court; that a
25 copy thereof was in due form of law lodged in the clerk's office of said court, and citation, duly executed, have been served on the defendant in error.

That as soon as your petitioner could obtain sureties to execute with her the bond required by law to supersede the execution of said judgment pending the said writ of error, although before his departure from said district, the said district judge holding said circuit court made an order in said cause, a copy of which is hereto annexed, authorizing the clerk of said court to approve the bond to be taken in said cause, your petitioner was informed by counsel that it was doubtful if the approval of said clerk was sufficient in law; yet she obtained the approval of said clerk, and on the 4th day of August, A. D. 1873, the earliest moment at which it could be done, forwarded said bond so approved to the Hon. W. B. Woods, circuit judge, for approval. Said bond was forwarded by mail and by register letter, a copy of the receipt for which is hereto attached, as well as the reply of the said circuit judge.
26 That on account of some derangement of the mails said bond did not reach said circuit judge until the 10th day of August, when the same was approved and returned to New Orleans, but arrived at said latter place only on the 15th day of August, A. D. 1873, two days too late to be filed in the said cause within the period of sixty days allowed by law. Your petitioner attaches hereto said bond, together with the endorsement of approval thereon, and represent that she verily believes that said judgment is erroneous in law, and if permitted to be executed before the determination of the Supreme Court upon said writ of error, it will cause irremediable injury to your petitioner.

Wherefore your petitioner prays that your honor will, considering the premises, exercise in behalf of your petitioner that discretion vested in your honor in and by the 11th section of the act of Congress approved June 1st, 1872, and endorse on said bond permission that the same be filed to act and operate as a supersedeas in said cause, and your petitioner will ever pray, &c.,

(Signed) J. R. BECKWITH,
27 *Atty. for Dft. and Petitioners.*

DISTRICT OF LOUISIANA, *ss:*

J. R. Beckwith, being first duly sworn, deposes and says that he is the atty. of the foregoing petitioners; that he knows the foregoing petition to be true, as therein stated and set forth.

(Signed) J. R. BECKWITH.

Sworn to and subscribed before me this 16th day of August, 1873.
(Signed) F. B. VINOT, *Dy. Clerk.*

Petition granted Aug. 28th, 1873.
(Signed) JOSEPH P. BRADLEY,
Associate Justice Sup. Court U. S.

Bond.—Filed September 2d, 1873.

Know all men by these presents, that we, Ann E. Kittredge, widow in community, administratrix of the succession of Ebenezer E. Kittredge, deceased, and tutrix of Lucy E. Kittredge, Carrie Kittredge, Iola Kittredge, and Oena Kittredge, minors, heirs of the said Ebenezer E. Kittredge, and individually as principal, and R. N. Sims, D. W. Keely,
28 and Jos. K. G. Kittredge, all of the State and district of Louisiana, as sureties, are held firmly bound unto Olivia C. Race, aided and assisted by her husband, Geo. W. Race, in the full sum of eighteen thousand and three hundred dollars, to be paid to the said Olivia C. Race, her certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, firmly by these presents, sealed with our seals and dated this 31st day of July, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas lately, at a circuit court of the United States in and for the fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein the said Olivia C. Race, aided and assisted by Geo. W. Race, her husband, is plaintiff, an' the said Ann E. Kittredge, widow in community, administratrix of the succession of Ebenezer E. Kittredge, deceased, and tutrix of said above-named minors, heirs of said Ebenezer E. Kittredge, deceased, is defendant, judgment was rendered against the said Mrs. Ann E. Kittredge, defendant, in her said above-described capacity, as well
29 as individually, and against said minor heirs, as more fully and at large appears by the record of said judgment now remaining of record in said court; and the said above-bounden Mrs. Ann E. Kittredge, defendant in said suit as aforesaid, having obtained a writ of error, and filed a copy thereof in the clerk's office of said circuit court, to reverse said judgment in the aforesaid suit, and a citation directed to said Mrs. Olivia Race, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of this obligation is such, that if the said Mrs. Ann E. Kittredge, defendant, in her said capacity, shall prosecute said writ of error to effect, and answer all damages and costs, if she fail to make her plea good, then this obligation shall be void, but otherwise in full force and effect.

(Signed)	ANN E. KITTREDGE.	[SEAL.]
(do.)	R. N. SIMS.	[SEAL.]
(do.)	D. W. KELLEY.	[SEAL.]
(do.)	JOS. K. G. KITTREDGE.	[SEAL.]

Attest:
(Signed) J. R. BECKWITH.

30 The within bond acknowledged before me, at the parish of Assumption, July 31st, 1873.
(Signed) ALFRED TETE,
Parish Judge of the Parish of Assumption, La.

Approved pursuant to order of court of June 20th, 1873.
New Orleans, August 4th, 1873.
[SEAL.] (Signed) F. A. WOOLFLEY,
Clerk U. S. Circuit Court, District of Louisiana.

The foregoing bond approved.
(Signed) W. B. WOODS,
U. S. Circuit Judge.

THE STATE OF LOUISIANA,
Parish of Assumption:

Before me, the undersigned authority, personally came & appeared R. N. Sims, D. W. Kelley, and Jos. K. G. Kittredge, who, being duly sworn, say that they are respectively worth, over and above their debts and liabilities, the sums set opposite their names below, and that their property is situated within the jurisdiction of the United States circuit court for the district of Louisiana, namely:

R. N. Sims, seven thousand dollars..... $7,000 00
D. W. Kelley, three thousand dollars..... $3,000 00
31 Jos. K. G. Kittredge, twelve thousand dollars..... $12,000 00
(Signed) R. N. SIMS.
(do.) D. W. KELLEY.
(do.) JOS. K. G. KITTREDGE.

Sworn to and subscribed before me this 31st day of July, 1873.
(Signed) ALFRED TETE,
Parish Judge, Parish of Assumption.

I hereby certify that Alfred Tete, whose signature appears to the foregoing jurat, is the duly qualified and acting parish judge for the parish of Assumption, State of Louisiana, and that full faith and credit are due to all of his official acts as such.

In testimony whereof I hereunto affixed my official signature and the seal of the parish court for said parish, this 31st day of July, A. D. 1873.
[SEAL.] (Signed) E. L. HEBERT,
Clerk 15th Judicial Dist. Court, and Ex-officio Clerk of the Parish Court of Assumption.

I hereby certify that Emile L. Hebert whose signature is affixed to the above certificate, is the duly qualified and acting clerk of the fifteenth judicial district court of the State of Louisiana, in and for the
32 parish of Assumption, and as such ex-officio clerk of the parish court of Assumption Parish, and that full faith and credit is and ought to be given to all such of his official acts.
(Signed) ALFRED TETE,
Parish Judge, Assumption, La.

PARISH OF ASSUMPTION, *July 31st*, 1874.

Order to file bond.

In consideration of the unavoidable delays which have occur'ed in the filing of the within bond, without the fault of the plaintiff in error, let the same be now filed as soon as received by the clerk in due course of mail, to operate as a supersedeas in the cause.
August 28th, 1873.
(Signed) JOSEPH P. BRADLEY,
Associate Justice Supreme Court of U. S.

33 UNITED STATES OF AMERICA :

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 32 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case o Mrs. Olivia C. Race, wife, and George W. Race, her husband, vs. Mrs Ann E. Kittredge, administratrix, &c., No. 6799 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court at the city of New Orleans, this 6th day of September, A. D. 1873.

(Six words erased null.)

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, E. H. Durell, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was at the time of signing said certificate, and is now, the clerk of said court ; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 6th day of September, A. D. 1873.

E. H. DURELL, *Judge.*

34 THE UNITED STATES OF AMERICA, *ss :*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Mrs. Olivia C. Race, aided and assisted by her husband, George W. Race, plaintiff, and Mrs. Ann E. Kittredge, widow in community and administratrix of the succession of E. E. Kittredge, deceased, and tutrix of the minor heirs of the said E. E. Kittredge, deceased, defendant, a manifest error hath happened, to the great damage of the said Mrs. Ann E. Kittredge, widow in community, administratrix of the succession and tutrix of the minor heirs of E. E. Kittredge, deceased, defendant therein, as by her complaint appears :

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Nathan Clifford, associate justice of the said Supreme Court of the United States, this twentieth day of June, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] F. A. WOOLFLEY,

Clerk of the United States Circuit Court for the District of Louisiana.

(Indorsed:) United States circuit court. No. 6799. Mrs. Ann E. Kittredge, administratrix, &c., plff. in error, versus Mrs. Olivia C. Race & husband, defts. in error. Filed June 20th, 1873.

F. B. VINOT, *Dy. Clk.*

35 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to Mrs. Olivia C. Race, ai'ed and assisted by her husband, George W. Race, and to George W. Race, husband of the above-named Olivia C. Race, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Mrs. Ann E. Kittredge, widow in community and administratrix of the succession of E. E. Kittredge, deceased, and tutrix of the minor heirs of the said E. E. Kittredge, deceased, plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this twentieth day of June, in the year of our Lord one thousand eight hundred and seventy-three.

E. H. DURELL, *Judge.*

36 (Indorsed:) United States circuit court. No. 6799. Ann E. Kittredge, w'ow in community, & admx. of the succ'n of E. E. Kittredge, dec'd, & tutrix, plaintiff in error, vs. Mrs. Olivia C. Race & husband, defendants in error. Citation.

Marshal's return.—June 25, '73. On the 26th day of same month and year, served a copy of within citation in error on Race, Foster, and E. T. Merrick, named herein, by handing the same to E. T. Merrick.

New Orleans, June 26th, 1873.

S. W. REED,
Dy. U. S. Marshal.

On this 26 day of June, 1872, personally came and appeared before me S. W. Reed, the subscriber, a deputy marshal for the district of Louisiana, who, being duly sworn, declared that on the said 26 day of June, 1873, he served a copy of the within citation on Race, Foster, and E. T. Merrick, attys. for the defendants in error, by handing the same to E. T. Merrick, esq.

S. W. REED,
Dy. U. S. Marshal.

Sworn to and subscribed before me this 26 June, 1873.

F. B. VINOT,
U. S. Comm'r.

(Indorsement on cover:) No. 291. Ann Kittredge, widow & admx. of E. E. Kittredge, dec'd, & tutrix of the minor heirs of said E. E. Kittredge, plaintiff in error, vs. Olivia C. Race & her husband, George W. Race. Louisiana C. C. U. S. Filed 20th October, 1873.

United States Supreme Court.

Oct. Term, 1874.

ANN KITTREDGE, Widow and Administratrix of E. E. Kittredge, and Tutrix of the Minor Heirs of said E. E. Kittredge, Plaintiff in Error,
vs.
OLIVA C. RACE, and her Husband. GEORGE W. RACE.

No. 291.

In Error to the Circuit Court of the United States for the District of Louisiana.

BRIEF OF PLAINTIFF IN ERROR.

Doctor Kittredge was twice married. The plaintiff in this suit, Mrs. Race, is his daughter by first marriage; the defendant is his wife by second marriage. The suit is brought on two promissory notes for $15,000 and upwards, given by Dr. Kittredge to Mrs. Race. The following are the allegations of her petition: "That on or about Feb- "ruary 10, 1862, said Dr. E. E. Kittredge, in his capacity "as tutor, made a settlement with petitioner for the amount "then due her from her mother's estate, and then executed "and delivered to her therefor, which she now holds and "owns, his two promissory notes," &c., &c., (Record, p. 1;) and the prayer is "for citation against Mrs. Ann E. Kit-

" tredge, as widow in community, tutrix, and administra-
" trix, &c., as aforesaid; that she be ordered, in her sev-
" eral capacities aforesaid, to answer under oath and within
" the legal delay, the subjoined interrogatories on facts and
" articles; and, finally, for a judgment against her in her
" several capacities aforesaid, and against said succession
" of Dr. E. E. Kittredge for the amount of said two notes,
" * * * with eight per cent. interest thereon from Feb-
" ruary 3, 1869, until paid," &c.

Record, p. 2.

On November 14, 1872, Mrs. Kittredge excepts and says: That no cause of action is set forth against her personally or as surviving widow in community; that the claim against her as administratrix is prescribed, and *lis pendens*. The prayer of this exception is for judgment whether said plaintiff ought further to have and maintain her said action against this defendant individually or as widow in community.

Record, p. 6.

On the same day she filed another exception to answering the interrogatories, but annexing her answers to the exception. (Rec., p. 5.) Then she filed pleas of prescription and *lis pendens*, (Rec., p. 4,) which were followed by an answer containing the general issue, " *in the event* that " the several exceptions by her in her character and capac-
" ity aforesaid, hereinbefore pleaded, be overruled, *and not* " *otherwise*," &c., &c.

Rec., p. 4.

In this state of the pleadings the jury was waived, and the whole case, exceptions and all, came before the court for

judgment, (Rec., p. 7,) which was in due time in favor of Mrs. Race " and against Mrs. Ann E. Kittredge, in her said capac-
" ity of administratrix of the succession of Ebenezer Kit-
" tredge, deceased, for $11,788.50, with 8 per cent. interest
" thereon from February 3, 1869, until paid, with all costs of
" this suit, and to be paid out of the assets belonging to said
" succession in her hands for administration; and that said
" Ann E. Kittredge, in her individual capacity and as
" widow in community, bound for one-half of said debt
" and interest, do pay the said plaintiff one-half part of
" said debt and interest, viz: $5,894.25, and interest thereon
" at eight *per centum per annum*, from February 3, 1869,
" until paid; and that there also be judgment against
" said minors, Lucy E., Carrie, Iola, and Oena Kittredge,
" with benefit of inventory of their virile shares of said
" debt, the one-eleventh part of the remaining half, with 8
" per cent. interest thereon from said February 3, 1869,
" each, and against all said defendants *in solido* for all
" costs, it being understood that there is to be but one sat-
" isfaction for the whole sum and interest herein first afore-
" said."

Rec., pp. 7 and 8.

To revise this judgment, Mrs. Ann E. Kittredge prosecutes this writ of error.

ASSIGNMENT OF ERRORS.

1. The judgment is erroneous in the following particulars, *viz*:

(*a*.) It is for too large an amount.

(*b*.) It is against Mrs. Kittredge in several capacities.

(*c*.) It is against minors who are not parties to the suit, and have no capacity to act or stand in judgment, who

have been served with no process, nor made any appearance.

2. The lower court, after the whole case, exceptions, and merits had been submitted, erred in ignoring the exceptions filed, and in proceeding to judgment without disposing of them.

3. And in granting to plaintiff in a suit at law relief which is purely equitable, and which would require the action of at least two distinct courts in Louisiana to consummate.

4. And in allowing interest at 8 per cent. after maturity of the notes, instead of five per cent., as the law requires.

5. And in ordering the payment of the judgment out of the assets belonging to Dr. Kittredge's succession under administration.

6. And in decreeing that Mrs. Kittredge was *personally* liable, in this suit, for one-half of the judgment against her as administratrix of her husband's succession, with the interest named.

7. And in rendering judgment in this suit against four minors, with like interest, and for all costs, *in solido*.

ARGUMENT.

If, in this case, the jurisdiction of the lower court, *ratione personæ*, be admitted, the limitations to the jurisdiction, *ratione materiæ*, are at once suggested. How, in a single suit at law, in an action of assumpsit, on promissory notes, can judgment be rendered against the defendant in three different capacities, viz: as administratrix of her

husband's succession, as surviving widow in community, and as tutrix of her minor children?

Let it be admitted, *first*, that the United States courts once having jurisdiction *ratione personæ*, then their jurisdiction *ratione materiæ* extends to all cases within the pecuniary limits fixed by law; *second*, that this jurisdiction is not limited or restrained by the local remedies of the different States; *third*, that these national courts cannot abdicate their authority or duty in any case in favor of another jurisdiction; *fourth*, that when jurisdiction has once lawfully vested it extends to all questions in the case itself, or growing out of it; *fifth*, that the national courts can and do enter up judgments which they will not enforce; still, we think it must be denied that the lower court had the judicial power to enter up the singular judgment rendered in this case.

And we protest against any conclusion being drawn from it unfavorable to the system of law prevailing in Louisiana. The constitution of that State requires that "the judges of all courts, whenever practicable, SHALL "refer to the law, in virtue of which every definite judg- "ment is rendered; but in all cases they shall adduce the "reasons on which their judgment is founded." Without declaring that the United States circuit judge is absolutely bound by this mandate of the Louisiana constitution, yet it is abundantly plain he would have done well, in this case at least, to heed the constitutional injunction.

Now, without forms for judicial proceedings there can be no scientific administration of public justice. "Where "particular forms of action are prescribed by law, it is "necessary to an intelligent administration of justice that "these forms should be complied with." (Richardson *v.* Johnson, 1 La. Ann. R., 390.) "A man may be executor, "syndic, church-warden, &c. What he does in one qual-

" ity cannot prejudice him in another. Nor can he trans-
" fer what he has in one quality to the other. In each
" quality the personation is distinct, and is so maintained.'

Lapeyre *v.* Thompson, 7 La. Ann. R., 220.

This is the very old doctrine of the civil law, and necessarily lying at the foundation of the system. *Homo qui plures personas sustinet.* It is a universal principle of jurisprudence.

Trueman *v.* Loder, 11 Ad. & El., 589, *et passim.*

Now, admitting, for the sake of argument, that the appellant here was legally liable in her aforesaid three different capacities, still, three different suits and three different judgments would be required to enforce the different liabilities. In no other conceivable way could the three causes of action be novated [merged] in judgments, or the elements of the thing adjudged be preserved.

Here the causes of action are irreconcilable and destroy one another. The administrator of a succession in Louisiana is not the owner of the deceased's personalty, but the mere agent of the heirs; and the heirs become, at the very instant of their ancestor's death, the OWNERS of his estate, both movable and immovable. *Le mort saisit le vif.* This is the fundamental idea of all successions, and of the office of administrators, curators, and executors, under the civil law.

Maine Ancient Law, 174, *et seq.*

Hence, if liable as agent of the heirs to pay in due course of administration the debts of the deceased, he cannot be at the same time liable in law to pay the debts out

of his private property. Even in common law States this is a well-understood principle of law.

Boyle *v.* Kreitzer, 46 Penn. State, 465.
2 Troubat & Haley's Practice, 664.
Seip *v.* Drach, 14 Penna. State R., 352.

Not only are these two causes of action irreconcilable and inconsistent, but in Louisiana, and probable in all countries where the civil law prevails, two distinct jurisdictions are required to enforce them. The responsibility of an administrator must be enforced in a probate court, unless the administrator is held *personally* liable for maladministration. In the latter case the probate court is without jurisdiction. If sued as administrator *de son tort*, or on his bond against him and his sureties *individually*, recourse must be had to a court of general jurisdiction to enforce payment out of the defendant's property.

See Hennen's Digest, Vol. 1, p. 345, for very many cases, No. 7, *et seq.*
Louis'a Code of Practice, (1870,) Art. 149.
Monget *v.* Pate, 3 Louisa. An., 485.

From the allegations of the petition, it appears that long before this suit was brought the probate court of Assumption parish, Louisiana, had rendered judgment in favor of Mrs. Race for the very notes in controversy in this suit.

See Rec., pp. 1 and 2.

But the inconsistency of these two causes of action is raised to an indefinite extent by the addition to them of a third cause of action against the defendant, Mrs. Kittredge, namely, as tutrix of her minor children, and where judgment is rendered against the minors by name

for a portion of the notes. We freely admit that we cannot account for the difficulties this portion of the case presents. This part of the judgment is quite as strange as the other portion; and, as a whole, cannot be supported.

FINALLY, the only judgment which could be rendered on these pleadings in a Louisiana probate court would be against the administratrix, *payable in due course of administration.* The creditor can only be paid concurrently with other creditors of the succession. (See Code of Practice, articles 983, *et seq.*, A. D. 1870.) Throughout the entire system of the civil law, the debtor's property is the common pledge of ALL his creditors; and no preference or privilege is tolerated *unless expressly granted by law.* An equitable lien is wholly unknown.

Besides these objections, the farther point is made that the judgment is rendered for too large an amount.

A contract to pay interest up to eight per cent. per annum "MUST be fixed in writing; *testimonial* proof of it is "not admitted in any case."

La. Code of 1870, article 2924.

"All debts shall bear interest at the rate of five per "cent. from the time they become due, unless otherwise "stipulated."

Revised La. Statutes, 1870, sec. 1883.

The eight *per cent.* stipulated in the notes sued upon, therefore, only runs from date till maturity. There is no stipulation for that rate after maturity, either expressed or implied in the notes.

McLaughlin *v.* Sauvé, 13 La. Ann. R., 99, and cases cited.

See La. Code of Practice, articles 553, 554.

We conceive the true doctrine to be laid down in Ludwig *v.* Hunsinger, (5 Watts and S., 51.) Whether the contract stipulates a smaller or larger rate of interest than that allowed by law, all judgments should bear interest at the lawful rate.

In the often recurring cases of suits and judgments upon *coupons* of railroad company bonds, the application of this principle becomes important.

II. " After hearing the pleadings, evidence, and counsel, " the court took time to advise," is the entry on the minutes of the lower court, (page 7 of the Record,) May 13, 1873. The judgment was rendered on June 9, 1873, and the reason given therefor is that "the law and the evi- " dence being in favor of the plaintiff, Mrs. O. C. Race, it " is ordered," &c., &c.

This is a dubious compliance with the constitution of Louisiana, article 80, and the act of Congress of June 1, 1872, sec. 5. (17 S. L., 197.)

The court could not proceed to final judgment without first disposing of the various interposed exceptions. Even if frivolous or manifestly untenable, they were entitled to notice. It is a general principle " where a matter is pend- " ing on the determination of which the next step depends, " that next step cannot be taken."

2 Hennen's Digest, p. 1580, No. 11.
Johnson *v.* Emerson, 6 Exchequer, (L. R.,) 360.
La. Code of Practice, 1870, Articles 327, 333.

III. The idea is very prevalent that the United States courts can and do grant greater relief to a suitor than the State courts. The petition in this case and the judgment rendered thereon are strong proofs of its existence and strength. But this idea must be erroneous, unless this

action at law is well founded. We have already shown its anomalous character, and the inconsistency of the three causes of action, which cannot be cumulated under Louisiana law; and, if viewed as a proceeding under the common law as a simple action in assumpsit on a promissory note, its anomalous character is still more apparent.

We had written thus far when the decision was read in the case of Zouley *v.* Lavender, January 11, 1875, which we conceive authorizes us to submit the remaining assignments of error without argument. See also—

Williams *v.* Benedict, 8 Howard, 107.
Bank Tenn'see *v.* Horn, 17 " 160.

We pray your Honors to reverse the judgment in this case.

Respectfully submitted.

DURANT & HORNOR,
Att's for Plaintiff in Error.

WASHINGTON, D. C., *January* 14, 1875.

Supreme Court of the United States.

No. 291—*October Term*, 1874.

ANN E. KITTRIDGE,

WIDOW AND ADMINISTRATRIX OF E. E. KITTREDGE, DECEASED, AND TUTRIX OF THE MINOR HEIRS OF SAID E. E. KITTREDGE, PLAINTIFF IN ERROR,

versus

OLIVIA C. RACE, AND HER HUSBAND, GEORGE W. RACE.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

The counsel for the plaintiff in error has omitted from his statement of the case some of the most important allegations contained in the original petition, setting forth the cause of action.

It will be seen by the petition, as well as the notarial act of compromise therein pleaded, which we have annexed in full to this brief as an appendix, that this suit is not the suit of a mere creditor against an estate. It

is the suit of an *heir* who is also a creditor demanding the liquidation of her claim against the estate, widow in community and co-heirs, in order to make it available at least in the partition contemplated by the heirs.

And this very form of action will be shown to be necessary by the proceedings of the heirs in their attempts to make a partition.

Among other matters omitted by plaintiff's counsel, from the statement of the allegations of the petition setting forth the cause of action, are the following allegation, viz:

"That the payment made on account of said notes by her as aforesaid, was put on the first provisional account filed by her on the 9th July, 1869, in said succession, as follows:

"February 3d, 1869, succession paid by Bogart to G. W. Race, on account of his wife's claim, five thousand dollars ($5,000) "which account was homologated, and that said notes were further acknowledged for the balance due thereon by said Mrs. Ann E. Kittredge, in her several capacities of widow in community, natural tutrix of her minor children, and administratrix as aforesaid; and all the major co-heirs of petitioner in a document by public act passed before N. A. Pintado, recorder and *ex officio* notary public, on the 21st of March, 1870, *purporting to be a compromise* BETWEEN THE WIDOW IN COMMUNITY, TUTRIX, AND ALL THE HEIRS, EXCEPT PETITIONER TO SAID SUCCESSION, wherein, among other things and divers illegal stipulations speaking of the balance due your pe-

titioner on said promissory notes, the following acknowledgment is made, viz :

"And now, as A BASIS OF SETTLEMENT OF THE INTEREST OF SAID PARTIES OF THE FIRST PART IN AND TO THE SUCCESSION OF SAID DR. E. E. KITTREDGE, AND AS A MODE OF LIQUIDATING, PAYING AND SETTLING THE SAME, it is hereby covenanted and agreed, first, that the following debts due by the succession of said Dr. E. E. Kittredge shall be assumed and placed at the charge of the parties of the second part, and the said parties of the second part warrant and guarantee said parties of the first part against all liabilities from the same, viz: 'A debt of about eleven thousand dollars, due Olivia Corinne Race, balance due her from her mother's succession.'"

We have annexed, as stated, to this brief as an appendix, the whole act of compromise between the other major-heirs, the widow in community and the tutrix on behalf of the minors.

The quotation copied into the petition will be found on page 5 of the APPENDIX.

The allegations of the petition as well as this notarial act, show that the other heirs and widow were making a partition of the estate by way of compromise, she being the party of the second part, as widow and tutrix.

There is another inaccuracy in plaintiff's statement of the case, in this: She states that the whole case, "exceptions and all," come before the lower court for judgment, on the waiving of the jury.

The document annexed as an appendix, (and only an

item of proof) was approved by a family meeting, homologated by the judge, and the property was sold and the purchase made as contemplated by the act, Mrs. Kittredge buying in the property to the amount of $160,000, but paying no money. The major heirs, Mrs. Whittington, Mrs. Jones, Mrs. Ewing and Joseph E. Kittredge were provided for by plantations and lands secured them. The widow mortgaged the lands bought, (Elm Hall) to Mrs. McNeil and Mrs. Sims for $20,000 each for their shares of the estate, and the residue for the minors, etc.

They all went into the enjoyment of the estate to the entire exclusion of Mrs. Race, and had been in such enjoyment without any further legal steps when this suit was brought. With the exception of the credit on the notes admitted in the petition, Mrs. Race has not only been excluded from the estate, but refused payment of her debt, due for her mother's estate, the basis of the large wealth accumulated afterwards by her excellent father, and from which she is sought to be excluded, notwithstanding his wishes disclosed by the interrogatories. This was the condition of the parties and estate when this suit at law was brought, and another in chancery setting up and referring to this for a partition. Some proceedings were also subsequently taken in the State court, but they are permitted to slumber on the docket.

The submission of the case to the court instead of the jury on the merits, was a waiver of the formal excep-

tions. See page 7, printed record The truth is, the court had already expressed an opinion on the exceptions as to the form as to Mrs. Kittredge, and counsel did not further insist on the same when the case was called for trial on the answer, and on the plea of prescription, which is in the nature of an answer, and is often so pleaded.

ARGUMENT.

Before proceeding to consider the special assignments of error in the case, we will call the attention of the court to some general considerations, which we hope will help to elucidate it.

The case, tried on the merits by consent, is without a bill of exceptions.

The judgment, it must be assumed, was justified by the proof and rendered upon ample evidence. The burden of proof must be upon our adversaries to show the errors of law *committed by the court below*, which invalidates the judgment. For, if the judgment of the lower court, *upon the issues made* and *the proof adduced* was not erroneous, there is no reason to complain. But, as the plaintiff in error has allowed all the proofs to go in without objection, and as she has reserved no bill of exception, there is nothing to show what the proof was. In the argument which we propose to offer, it is clear that if we can show that any state of facts would justify the decree, we are authorized to assume that that state of facts existed. But, as the *proofs which were really offered*

in evidence are the most pertinent, we may be pardoned if we refer to them as such.

The husband is the head and master of the community during marriage, and bound absolutely for the *whole* debt contracted during that time as a *legal* obligation due by him. At his death, his executors and administrators are in like manner legally bound for the whole debt. In the same manner, his heirs, who ask to partition his estate or otherwise accept his succession, are collectively bound for the whole debt, each heir for his virile share (proportion) of the same; and this also is an absolute and legal obligation, but if certain forms are pursued may be with benefit of inventory.

The widow cannot accept the community which existed between her and the deceased husband, *with benefit of inventory*, but she has the right to renounce it. If she does not renounce the community, or claims it in partition, she is bound absolutely for one-half of all the debts of the community, and there is also a *legal* obligation which gives the creditor the right, as we shall subsequently see, to sue her at the same time he is trying to collect the whole debt from the estate of the deceased husband.

To be more explicit, estates of deceased persons under our law, where the heirs are of full age, may be accepted by them purely and simply, that, is *absolutely*. In which case, the heirs become the absolute owners of all the property, and are the *absolute* debtors, each for his

proportion of all the debts, and there is no administration.

If the major heirs do not wish to bind themselves for the debts, they may accept the succession *with the benefit of inventory*, in which event, an administrator becomes necessary, and one is appointed, and the heirs are only bound for the assets.

Prior to 1848, estates were accepted with the benefit of inventory on behalf of minors by the tutor only upon the advice of a family meeting, a jury of five male relations. Since then, (see act 1848, p. 84,) the *law* accepts for the minors with the benefit of inventory, that is, only binds them for the debts to the extent of the assets, aud where there are also major heirs an administrator is appointed as a matter of course. But if *all* the heirs are minors, then the tutor or tutrix can (if the creditors do not interpose) administer the estate without giving bond, or taking out letters of adminstration.

But where solvent estates have been administered by administrators, there comes a time (as has happened in this case) when it is important that the estate should be divided among the heirs, and this may occur before all the debts are paid, especially if the debt is due to an heir, or the widow in community; for the debt, after being liquidated by a decree, can then be adjusted in the partition; and for this condition of the estate the Civil Code has expressly provided. Thus, the notary, in making the partition, after forming what is called the

active mass, (or assets to be divided,) must make deductions to settle these debts; and the precise case at bar is stated in article 1281 of the Civil Code of 1825, as follows:

"The deductions which are to be made before the partition consist—

"1st. Of *the sums due* to one or more of the heirs for A DEBT DUE THEM BY THE DECEASED, or advances made to the succession, or expenses on its effects, according to the amount settled among the heirs;"

"2d. Of the amount owing to the heirs to whom collation is due when the collation is made by taking less, in order that the heirs may receive a portion equal to the amount of the collation which is due;"

"3d. Of the privileged debts due or paid on account of the succession which may have been incurred since the death of the deceased, or in order to effect the partition."

The estate of E. E. Kittredge having been under administration, the widow and heirs had entered into the act of compromise, and had sold the lands to effect a partition, Mrs. Race excepted, under the document referred to in plaintiff's original petition, (page 2 Printed Record,) AND ANNEXED TO THIS BRIEF AS AN APPENDIX.

Assuming the existence of the document pleaded as alleged, and that it is in the form certified, it gave the plaintiff, as a large creditor and heir, a right to bring suit in the Circuit Court of the United States against, 1st, Mrs. Ann E. Kittredge, as administratrix, to have

the debt established against the succession; 2d, against Mrs. Ann E. Kittredge, as widow in community, for her one-half of the debt; and 3d, to have the debt recognized as against the minor heirs, with the benefit of inventory for their virile shares; so that in the partition to which Mrs. Race should be admitted, there should be no further question of her right to be paid the notes by a deduction to be made according to law in the partition. The major heirs could hardly be supposed capable of contesting their notarial admissions. As the parish court is *now* one of limited jurisdiction, the preliminary settlement of the question will prevent much delay. C. C. of 1825, Art. 1290. Indeed, under the old law, in the case of Babin vs. Nolan, no less than nine appeals were taken to the State Supreme Court, before that case was finally decided. See 6 Ann. 295.

Such appeals, under the State law, are necessary.

See two contradictory *opinions* (not decrees) in the same case on this subject.

Gay vs. Marionneaux, 20 A. 358.

Gay vs. Marionneaux, 21 A. 2 8.

The absolute denial of the right of the defendant in error, and by the tutrix on behalf of the minors in this case, as well as her denial in her own right, show the necessity of the suit against them under the allegations of the petition. C. C. 986, 987, 988, and cases cited; C. C. 1290, 1294. These separate denials might have occasioned two appeals, if the party had awaited the

tedious liquidation of the claim in the State court in the action of partition.

Civil Code, 1825, Art. 1290.

Succession of Pinniger, 25 A. 55.

Supposing that plaintiff's counsel had before them the notarial act shown by the appendix to this brief, and they also entertained belief that the rights of his Mississippi clients might be prejudiced, if they should make themselves parties to any proceeding in the State court where the widow and resident heirs had shown so much anxiety to possess themselves of the whole estate, then they would see that the instrument, though called a compromise, was in fact a *partition* among the widow and all the heirs, majors and minors, except defendant in error. Civil Code of 1825, Art. 1440; Williamson vs. Amilton, 13 A. 387.

On page 11 of the *appendix* to our brief, the court will observe a covenant that the minors were to be bound by a family meeting, which, for its validity, presupposes a decree of homologation to follow, as it did.

The instrument, therefore, shows that the widow and major heirs were bound as such, and if the plaintiff's debt should be declared binding upon the minors, so far as to entitle plaintiff to payment out of the estate, and so that there could be no partition without a provision for the payment of this debt, as required by the article of the Code already cited, the case would be greatly advanced towards partition.

The administratrix had not divested herself of her trust, but she had shown that she was delivering the estate up to the heirs. She was, therefore, subject to suit as administratrix, and bound for the assets in her hands. The instrument also showed she was bound for one-half the debt, in her individual capacity as widow in community, and that the debt ought to be liquidated against her and the minor heirs she represents, so that it might be made available for Mrs. Race in the partition, as just said. Mrs. Kittredge, one of the parties of the second part, describes herself in the instrument as "Mrs. Ann E. Kittredge, widow of Dr. E. E. Kittredge, deceased, and herein *acting in her own right* as widow in community, and in her representstive capacity *as tutrix to her minor children* with her deceased husband, E. E. Kittredge, of the Parish of Assumption."

Appendix, page 2.

She signed the instrument as "ANN E. KITTREDGE, WIDOW AND TUTRIX." Appendix, page 12.

Under this instrument it was manifest, as substantially alleged, that the widow and heirs, major and minor, having possessed themselves of the estate, were proposing to divide it among themselves, and the major heirs were to escape responsibility themselves by taking the engagement of *the party of the second part*, (viz:) "Mrs. Kittredge, as widow in community and tutrix of her minor children, issue of her marriage with her deceased husband, E. E. Kittredge, of the Parish of Assumption,

State of Louisiana," to pay Mrs. Race the whole debt. See appendix, p. 2; printed record, p. 2.

The original petition followed the description which plaintiff in error gave herself in the said notarial act.

The prayer of the petition was for citation against the defendant, Mrs. Ann E. Kittredge, as widow in community, tutrix and administratrix, etc., for judgment against *her in her several capacities aforesaid,* and against the succession of Dr. E. E. Kittredge, for the amount of said two notes—say the sum of $11,788, with eight per cent. interest thereon, from 3d day of February, 1869, until paid, and also for general relief.

The defendant, having no objection to make as to the form of action—no plea of non-joinder of parties or misjoinder, and no plea of misnomer or misdescription, accepted the petition in the form it was written, and in her exceptions and pleadings set forth her capacities in the common form, and in precisely the same terms used in the notarial act, and in the petition. If she had any complaint to make, being better informed than others in this respect, she should have pleaded so as to give the plaintiff a better citation or writ. She filed on the 14th of November, 1872, two exceptions on other grounds: one in her character as administratrix of the succession of E. E. Kittredge, deceased, *and tutrix to his minor heirs* pleading therein, first, that the debt was barred by prescription of five years; and 2d, the pendency of another suit (in equity) for the same cause of action." Printed R. p. 4.

The other, as " the defendant, Ann E. Kittredge, *sued herein* as widow in community of the late E. E. Kittredge, deceased, *and as tutrix of the minor heirs* and *administratrix* of the succession of said deceased, and SEVERING IN HER DEFENCE in the said several characters and capacities in which she is in this action impleaded by J. R. Beckwith, her attorney, as a peremptory exception to the said plaintiff's petition, in so far as the same relates to or refers to said defendant as *widow in community*, and seeks to enforce such alleged demand against her said capacity individually," wherein she pleads—

1st. That the petition does not disclose any cause of action against the *defendant, individually*, for her share of the succession, and alleges:

2d. That the debt against defendant, in her individual capacity, is barred by the lapse of five years; and

3d. The pendency of a suit in equity involving the same matters. Rec. p. 6.

The defendant, at the same time she filed her exceptions, filed an answer to the whole case, in the event the exceptions should be overruled.

The clerk has evidently, by mistake, copied the answer which should have followed the exceptions in the wrong place. See answer, p. 4, p. 5.

By a written agreement on file already alluded to, the jury was waived, and the case was tried by the court. Rec. p. 7.

All the testimony, as already mentioned, was received without objection, and the court, finding it ample, ren-

the point of law in the lower court, if her counsel thought the instrument meant anything else than found by the court.

Any other conclusion would alarm the mercantile community. Technical niceties ought not to defeat the obvious meaning of parties, nor destroy substantial rights.

It seems to be conceded, and we do not dispute the proposition, that Mrs. Kittredge must be regarded as constituting as many persons as she sustains qualites in this suit. *If in each one of these characters she bears some relationship as debtor to the obligations sued on,* it would have been a much more serious objection to have omitted to make her a party in any one of her capacities, than to have adopted the present form of action. The form of proceeding is of frequent occurrence, and a search would no doubt reveal many such decrees as the one in this case. In the case of

Labauve vs. Goodbee, 25 Ann. page 483,

the phraseology of the decree against the minors differs from this, but is in substance the same thing. It is "against the minor heirs of said David Goodbee, deceased," and that is the only name or description given by the decree, although the minors can only be sued through their tutrix, while judgment is also against the widow in community and another party for the debt.

Assuming that plaintiff in error is right as to three characters sustained by plaintiff in error, the suit is against,

1st. The succession represented by her as administratrix;

2d. Against her individually; and,

3d. Against her as she styles herself in the notarial act, and in her pleadings, and in the writ of error, etc., as tutrix of her minor children, issue of her marriage with her deceased husband, E. E. Kittredge, deceased; and in fact, there is a separate judgment against each person, according to plaintiff's counsel. *Unus homo plures sustineat personas.* What is done in one quality cannot prejudice the party in another quality. Martin vs. Boler, 13 Ann. 370; Lessayoux vs. Thompson, 7 Ann. 220.

The court *a qua* might have rendered a decree, if the proof justified it, discharging her as widow in community, as if it had been pleaded and proven that she had renounced the succession, and held her bound as administratrix, and so *vice versa.* The discharge in one capacity would not necessarily (except by payment of the debt) exonerate her in the others, and so also as to her capacity of tutrix.

The objection is one really of joinder of parties. For if the party really is the debtor in the capacity alleged, and that fact has been judicially found by competent proof, the objection that she ought not to have been condemned to pay what she justly owes is, under our law, a mere question of form, which must be pleaded *a limine litis.*

The statute of 1870, No. 103, sec. 2, (bound with

acts 1871, p. 10,) declares, that "in all suits against joint obligors, it shall be unnecessary to make all the obligors parties to the suit, but each of the obligors may be sued and judgment against them separately for the proportion of the *debt* or *obligation* due by them respectively, whether all are joined in the suit or not." The joint obligation of the civil law differs from that of the common law in this, that the joint obligor owes only his *virile* share (proportion) of the debt, (C. C. 2081,) and the heir of an estate is only bound in the same manner, viz.: for his virile share of the debt: "Thus, the creditors of a succession must divide among the heirs the personal actions which they have against them, and cannot sue one for the portion of another, or one for the whole debt." C. C. 1376. Art. 1378: "*If one of the heirs be a creditor* of the deceased, confusion will only take place for his share of the debt, and he may claim from the co-heirs the part which each is bound to contribute for the payment of the debt." These provisions of positive law (under the title Partition, Code of 1825,) clearly justify the action against the defendant as tutrix of the minor heirs taking steps for a division of the estate. See Code of Practice: article 344.

But the plaintiff in error DID NOT PLEAD the objection of the misjoinder or nonjoinder of parties in the lower court at all; much less *a limine litis*. On the contrary, she voluntarily appears in each capacity and excepts on other grounds, and answers generally. Printed Record, page 4.

IT IS AGAIN OBJECTED that the minors are not parties to the suit, have no capacity to act or stand in judgment, and that they have not been served with process or made any appearance. This is somewhat inconsistent with the preceding objection, that the tutrix was made a party in too many capacities. If she is not a party as tutrix, then surely she has one capacity the less.

Under the law of Louisiana, minors are not served with process personally where they are provided with tutors. The citation is addressed to the tutrix, and and served on her and not on the minors. If the plaintiff in error had brought up the citation in this case, it would have shown the facts. See Emmer vs. Kelly, 23 A. 763; Mayes, Tutor vs. Smith, 11 Rob. 503.

But the plaintiff in error has a strange idea of what is an APPEARANCE, for in the first exception she files she commences—

"And now comes the defendant herein, by J. R. Beckwith, her attorney, and in her character as administratrix of the succession of E. E. Kittredge, deceased, *and tutrix of his minor heirs*, and for exception to said demand of plaintiff, saith," etc. Record, page 4, See C. P. 316, 322–329.

She describes herself the same way, as tutrix, in her exceptions on page 6 of the Record, and again in her answer, page 4.

In her petition for a writ of error, she describes herself as "Ann E. Kittredge, widow, and administratrix

of the succession and interest (tutrix) of the minor heirs of E. E. Kittredge, deceased," and in no other manner. See Printed Record, pages 8 and 9.

In the citation in error, she is described as "Mrs. Ann E. Kittredge, widow in community and administratrix of the succession of E. E. Kittredge, deceased, and tutrix of the minor heirs of the said E. E. Kittredge, deceased." Record, page 13.

In the writ of error, she describes herself as "Mrs. Ann E. Kittredge, widow in community and administratrix of the succession of E. E. Kittredge, deceased, and tutrix of the minor heirs of said E. E. Kittredge, deceased."

It thus appears that the plaintiff in error has no ground of complaint against the defendant in error for following the notarial form of Pintado originally adopted by the plaintiff in error in describing herself, especially as she pursues the same form in the more solemn proceedings before this court, and thus admits the sufficiency of the original petition: for if in the technical proceedings for a writ of error, the citation in error, and the writ of error itself, the description from the notarial act is sufficient, much more ought it to suffice (especially when not excepted to) under the liberal and non-technical practice of Louisiana.

And it seems to us, that that the plaintiff in error is placed in this dilemna, viz.:

She must admit that the original petition, to which she did not except or plead in abatement, is sufficient in

substance, or confess that she can take nothing by her writ of error, which, although of a more formal nature, is subject to the same objection.

If the citation in error and writ of error are sufficient in this respect to bring up the case before this court, then the same form is sufficient for the original petition and judgment thereon.

If the objection, under the Louisiana laws, were a matter of substance, which it is not, then it ought to be more fatal here to the proceedings on the writ of error. We have already stated that the TUTOR REPRESENTS THE MINORS fully and absolutely in all legal proceedings where the law has not otherwise expressly provided. Process served on the tutrix binds the minor heirs, as it is the only proper mode of citing them. Meyers vs. Smith, 11 R. 503; Code of Practice, Arts. 115, 116 and 194. So under the head who may bring actions,

"Tutors act themselves in all judicial proceedings in the name of their minors in all suits which may be brought for them, WITHOUT MAKING THEM PARTIES TO SAID SUITS. C. P. Art. 108; Dwight vs. Smith, Tutor, 9 Rob. 32; C. C. of 1825, Art. 344, Porche vs. Ledoux, 12 A. 350.

The practice in Louisiana is extremely liberal, as the court can see in the case in 25 An. 482 and 483, already cited, where the Supreme Court, reversing the judgment of the lower court, renders judgment in this general way, viz: "against the minor heirs of said David Goodbee, deceased."

See also similar judgments, or the recognition of the principle on which the case is based, in the following cases :

Barbarin vs. Barbarin, 3 A. 265.
Ford vs. Miller, 18 An. 571.
Normand vs. Babin, 18 An. 611.
Martin vs. Martin, 5 N. S. 172.
Grounx vs. Abat's Ex,'s, 7 L. R. 33.
Towles vs. Conrad, 3 R. 69.
Bryan vs. Atchison, 2 An. 462.
Martin vs. Dupre, 1 An. 239.
Collins vs. Babin, 16 An. 291–292.

Under the Constitution of 1812, the probate court, it is important to observe, had jurisdiction against minors to an unlimited amount, which is not the case in general under the present Constitution. This, while it explains the former cases, leaves the principles applicable to such cases now to be administered in other courts. See Roman vs. Roman, 4 L R. 202, and Cox vs. Hunter, 10 L. R. 427, where the demands against the minors were dismissed merely for want of jurisdiction in the *District* Courts. Bnt in the last case, the widow's liability was recognized as in other cases, the courts of ordinary jurisdiction having jurisdiction over her individually.

In Emmer vs. Kelly, 25 An. 763, "the citation was directed to the natural tutrix individually, *and as tutrix of her minor children*," the same is in this case, and it was held good. If the party does not object to answer

as cited, the court will not relieve him, because by excepting *in limine* the error can be corrected at once.

The case of Enders et al. vs. Steamer Henry Clay and Owners, 8 Rob. p. 30 is directly in point.

And the petition not excepted to must be held as containing all the requisites mentioned by Judge Porter in Ory vs. Winter, 4 N. S. 280, and sufficient; see also

Tracey vs. Turges, 7 N. S. 354.

Frierson vs. Irwin, 5 Ann. 531.

Marr vs. Barnes, 1 Rob. 190.

The Supreme Court of Louisiana says: "But the defendant made no objection to the generality of the petition. He joined issue upon the plaintiff's averments, and thus clearly precluded himself from a subsequent objection."

Ludeling vs. Frellsen, 4 An. 537.

See also Hefner vs. Vergez, 26 A. 148.

Graham vs. Rice, 23 A. 393.

Simmons vs. Howard, Preston & Barrett, 23 Ann. 504.

Smith vs. New Orleans, 24 A. 20.

Gayarre vs. Tunnard, 9 A. 255.

In the emphatic language of the Code of Practice, Art. 344: "After the defendant has pleaded to the merits, such exceptions *shall not be heard.* ALL NULLITIES ARE CURED."

The Revised Statutes of the United States are to the same effect.

THERE SHALL BE NO REVERSAL in the Supreme Court, or

in a Circuit Court, upon a writ of error, for error in ruling any plea in abatement other than a plea to the jurisdiction of the court, or for any error of fact." *A fortiori*, where the party did not even interpose the plea in abatement. R. S. U. S. sec. 1011.

THE SECOND ASSIGNMENT OF ERRORS, that the court erred in not passing on the formal exceptions filed, requires but a few words in reply.

The consent of plaintiff to go to trial on the merits without requiring a decision on them, was a waiver of the exceptions.

See Long vs Long, 3 Rob. 108.
West vs. Creditors, 4 A. 448.
Reynolds vs. Rowley, 3 Rob. 202–203.
Robottom vs. Tete, 8 Ann. 74.
Phœbe vs. Vienne, 11 An. 688.

"The exception, that the petition discloses no cause of action if not made *and passed upon* in the lower court will not be noticed on appeal." Syllabus in Yorke vs. Scott, 23 A. 54; see also St. Roman vs. Robson, 12 R. 194; and Zimmerman vs. Bartely, 14 A. 520.

Had the court refused to pass upon the exceptions, when called up by the pleader, the remedy was a bill of exceptions.

But there is another equally valid answer to this assignment of error, and that is that the court could not be called upon to consider anything but those matters PLEADED as exceptions, and in this case the formal ex-

ceptions are unfounded, and the plea of prescription, being defeated by proof, did not stand in way of judgment.

The almost universal practice in Louisiana is to try the plea of prescription, whether contained in the answer or not, with the merits, though a party has the right to plead prescription before answering, and call it up for trial. The final judgment disposes of the plea as well as all matters in bar, contained in the answer. See Singleton vs. Smith, 4 L. R. 432; McCarty vs. Benson, 7 Rob. 467; Bayers vs, Vinson. 9 Rob. 518, 519.

III AND V.—ASSIGNMENTS IN ERROR. The debt due by an estate under administration has always, we believe, been considered as proper for a suit at law.

It cannot matter whether it is due by one or many representatives, and when the *law* makes the widow and the heir liable for certain portions of it, it does not, on that account, become an *equitable* action or demand. C. C. of 1825, Art. 1006, Art. 1025, Arts. 2378, 2380; Monget, Tutor, vs. Pate, 3 A. 270.

Neither can it be an objection that the judgment in the legal action may need the aid of a court of equity or probate to carry it into effect. It is sufficient that the action is a legal action. Defendant in error cannot be deprived of her legal remedies, because equity might furnish a better remedy. Anchevos vs. Solomon, Peters C. C. 356; Wiggins vs. Armstrong, 2 Johns. Chy. 145; 1 P. Wm. 445.

The parish court is a probate court. Art. 87, Constitution 1868. But it has not unlimited jurisdiction, and hence separate suits are required sometimes to obtain judgments against estates, and enforce them in that court. This suit is an example. Our claim, being disputed and over $500, could not be brought in the parish or probate court against the estate.

We should have been compelled to sue in the State District Court, (if we had not found the United States Circuit Court open to us,) and then to go to the parish court to carry into effect our judgment.

See Arts. 85 and 87, Const. of 1868; 986 Code of Practice.

Swan vs. Gayle, 21 Ann. 480.

Edwards vs. Edwards, Tutor, 21 Ann. 610.

Mayer vs. Dayries, 24 Ann. 206.

Woolfolk vs. Woolfolk, 24 Ann. 282.

We have the same right to liquidate our debt against the parties in the courts of the United States, so that it may be enforced against them. We have a right to a judgment which shall compel the administratrix to place us on a tableau of distribution, if she makes one before going on with the partition. We have a right to a judgment against her for so much as she owes that we may have that allowed also without further delay in the partition, and executed if she refuses to pay over the large sums belonging to the estate in her hands. La. Rev. Stat. sec. 7, p. 8. We have a right to have the

debt liquidated, as to the minor heirs, who dispute our rights through their tutrix, so that it may be allowed us in the partition, which they provoke. Now, whether our rights, under the judgment are to be enforced by partition in the State or United States courts, or otherwise, the judgment in this case is what, in the present condition of the estate, the law, equity and right requires. See

Railroad Co. vs. Whitton, 13 Wall. 287–289.

Payne vs. Hook, 7 Wal. 429.

Suydam vs. Brodnax, 14 Peters 74–76.

Union Bank vs. Jolly's Administrators, 18 Howard, 506–507.

We have just shown that the obligation of Dr. E. E. Kittredge upon the notes was a *legal* one. It did not cease to be a legal one, by being cast upon his executor or administrator by his death. Such suits as this are always on the law side of the court, and continue until the heirs are put in possession.

Now, if the *heirs* accept the succession, the *law* binds them for the same debt, each for his virile share. This is again a legal obligation, as we have shown.

The widow, in accepting the community, also binds herself legally for the one-half of the same debt.

The remedy is therefore a legal remedy, and not an equitable one.

Again, Louisiana has no formulas for judgments any more than a court of equity has.

The formula suggested by counsel for plaintiff in error,

page 8 of his brief, is excellent, and is most often adopted by the courts where it is in contemplation of parties to settle up the estate before partition.

But it is not prescribed by the Code of Practice, which says:

Art. 986. "If the claim be not liquidated, or if the curator or testamentary executor or administrator have any objection to it, and consequently refuse to approve it, the bearer of the evidence of such claim, whatever may be its amount, may bring his action against the curator or administrator, *in the ordinary manner*, before the court of probate where the succession was opened, *or before the district court*, according *to the amount involved*, AND MAY OBTAIN JUDGMENT IN THE SAME MANNER AS IN OTHER CASES."

The form adopted under the pleadings and proof requiring the payment of the debt out of the assets, is one best adapted to this case, and is no more a decree in equity than a judgment against the administratrix "payable in the due course of administration" would be. Indeed, it is substantially the same thing, though here it is expected that the debt will be settled under Arts. 1272 and 1281, already cited from the Civil Code of 1825.

The Code of Practice contemplates a suit for a debt whether under $500 and within the jurisdiction of the probate court, or over $500 and within the jurisdiction of the District Court as an ordinary action.

VI. The judgment against Mrs. Kittredge personally FOR ONE-HALF THE DEBT is claimed to be error.

The acknowledgment of the debt in her capacity of widow in community, the compromising respecting the succession, and the stipulations respecting the payment of the debt, as alleged in the original petition, show that the widow was bound for one-half of the debt. This principle of Louisiana law does not admit of cavil.

The provisions of the Civil Code of 1825, the law of the case, are:

"Art. 2378. It is understood that in the partition of the effects of the partnership or community of gains, both husband and wife are to be *equally liable for their share of the debts* contracted during marriage, and not acquitted at the time of its dissolution,"

"Art. 2380. Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage by RENOUNCING the partnership or community of gains."

She is only permitted to do this by notarial act, as just said, after an inventory has been taken, and judgment can be rendered against her unless she renounces. C. C. of 1825, Arts. 2381, 2382, 2383 and 2384. But if she neglect to take inventory, or stipulate for the prolongation of term of payment of debts of the estate, or makes payment, she is personally bound for one-half of the debts. See also case of Saloy vs. Chexnaidre, 14 Ann. 567. It must be observed that in this last case, as the judgment sought was to enforce a mort-

gage an *indivsible* obligation and not a personal debt, which is divisible, the widow holding letters of administration of her husband's estate, which owned one-half of the land, should also be made a party as *administratrix;* and so the case was remanded. For explanation of this distinction, if needed, see Arts. 2109, 3249, 2107, 2379 of Code of 1825.

See, as to the widow's liability,

Cox vs. Hunter, 10 L. R. 427, *and decree.*

When this last named case was decided, the *District* Court had no jurisdiction over probate cases. See also

Chapman vs. Kimball, 6 Rob. 94.

Succession of DeJean, 5 Ann. 593,

And Collins vs. Babin, 16 Ann. 291.

But it is said that the widow in community cannot be bound for one-half of the same debt for which the succession is bound *in the same action.* We have already shown that this is matter for an exception, if there is anything in it which must be pleaded a *limine litis.* But in the case of Salory vs. Chexnaidre, 14 Ann. 567, which was by a *creditor* who was *not an heir*, and where the judgment in the lower court was against the tutrix for the minors absolutely, and *not with the benefit of inventory*, the obligation of the widow to pay the debt in the same suit was acknowledged by the court, but the case was *remanded, so that* an amendment might be made and *judgment might be rendered against the administrator* for the whole *at the same time* as against the widow for one-half.

This case differs from that also, in being brought by an *heir*, who seeks to have her debt allowed in the partition under the Civil Code, against all persons claiming the estate, and seeking to partition it among themselves. If Mrs. Race were not an heir, and if the widow and heirs had taken no steps towards a division of the estate, then we admit the suit should have been brought against the administratrix and widow in community. But the attempted partition, by whatever named called, brings another element into the case, and gives us the right to have the case settled with the minor heirs, as allowed by the articles of the Civil Code cited. Single suits are brought against principals and sureties; against principals and third parties bound under their promise to pay the same debt (*pact pactum constituum pecuniae alienae*) against joint obligors, against obligors *in solido*, and against those binding themselves in the stipulation for others. C. C. Art. 1884; Pothier on Obligations, part 2, chap. 6, sec. 3; Dupin ed. 1835, p. 287.

In every case where parties could be made defendants in equity, they may be made defendants under the Lou isiana law, if bound for the same debt, in whatever manner it may be. It would seem that a person disputing these propositions should, after judgment, produce some authorities to sustain his case.

Were a mistake even made, as to the joinder of actions or parties (a thing which we have no idea has been done in this case), and the defendant should not except to the action, but answer over, the error would be cured

as we have shown. Should the court desire to pursue the investigation of this point further, we refer it to Arts. 148, 152, C. P.; Kenny vs. Dow, 10 M. R. 601, 602; Savage vs. Foy, 7 Ann. 573.

Even in inconsistent demands the going to trial is a waiver of the objection.

Cuney vs. Brown, 12 Rob. 82.

VI. Sixth Assignment.

The question of costs does not touch the MERITS of the case. It does not impugn in any manner the right of the defendant in error to all the consequences of the finding of her right as alleged.

Plaintiff in error alleges that the judgment ought not to be *in solido* against the tutrix for the minors, or, which is the same thing, the minors themselves for the costs. That she can dispute on behalf of the minors the *defendants in error's* right to a deduction under art. 1281 C. C., put the plaintiff to all the trouble possible, and then claim that they each are entitled to divide these costs, *which they have occasioned*, in the same manner as they divide the paternal debt. They each bear by the decree one-eleventh of the debt to be paid out of their share of the assets of the estate, *the defendant in error* bearing her one-eleventh share of the debt.

Now, it seems to be claimed by this assignment of error, that each item of costs is to be divided into eleven parts, and the minors are each to pay one-eleventh only; for example, the filing of the answer is ten cents, and

these minors are each to pay one-eleventh thereof, and so of all other items. The party cast pays costs, and the other party no part thereof, and thus judgments in Louisiana for costs are *in solido.*

It would be absurd, against the party losing his cause at law, to decree the defendants to pay a proportion, as one-eleventh of the costs—residue to be paid by plaintiff who gains the suit.

See C. C. 2082.

Drew vs. Atchison, 3 Rob. 140.

Dugan vs. DeLizardi, 5 R. 224.

The heir, like the debtor of the joint obligation, is only bound for his share of the debts, and he stands in the same relation to the costs when he fails in a legal contest, which he has formed with the obligee. In regard to joint obligors bound only for virile shares of the debt, who ought, in dreference to all others, if preference were given to be permitted to pay costs *pro rata*, the Civil Code, to prevent any misapprehension, declares

Mayer vs. Dayries, 24 Ann. 206.

Woolfolk vs. Wooffolk, 24 Ann. 282.

We have the same right to liquidate our debt against the parties in the courts of the United States, so that it may be enforced against them. We have a right to a judgment which shall compel the administratrix to place us on a tableau of distribution, if she makes one before going on with the partition. We have a right to a judgment against her for so much as she owes that we may have that allowed also without further delay in the

partition, and executed if she refuses to pay over the large sums belonging to the estate in her hands. La. Rev. Stat. sec. 7, p. 8. We have a right to have the in that case that they even, are not to be relieved from the rule that the parties defeated shall pay the costs *in solido*. As there is no rule of law awarding costs in any form or relieving the parties from solidarity, or considering them in any other manner, the decree is not open to objection on that account. C. P., 549, 551, 552, 157.

We have examined the case of YONLEY vs. LAVENDER, as reported in the Chicago Legal News for 1875, p. 154, and invoke it as an authority in our favor.

We had no idea that the judgment, which it was necessary to obtain in this case in order to prevent the total loss of the debt by prescription, and to save our rights for the partition, could be enforced *by execution* against the estate or the minors. But we did believe, and such we affirm the law to be, that we can enforce the judgment, and it must have as full vigor and effect whenever we bring it before the probate court in the settlement of the estate as if rendered in the District Court of the State, and we do not see why we may not use it in a partition in equity in the courts of the United States. See Decree in Merchant vs. Girod, 4 Howard, 562; Payne vs. Hook, 7 Wallace, 425.

The judgment against the widow in community, having by reason of her failure to renounce as well as her attempt to partition the estate, became personally bound

by law, can be enforced against her individually by execution.

There are a few other matters in brief of plaintiff in error, which require notice:

FIRST, as to the constitutional objection. It is difficult to see what better reason could be given for a judgment than because the LAW and the EVIDENCE were in favor of the party in whose favor the judgment was given.

Banks vs. Botts, 10 L. R. 42.

Morgan vs. Police Jury, 11 L. R. 162.

SECOND. We do not see any allegation in the original petition, showing that judgment has already been rendered on the notes sued on in a State court. Payment of interest and claiming credit therefor in the *defendant's* account in the probate court, is not such suit. The defence of *res judicata* must be specially pleaded.

THIRD. Parties have often sought for a partition of estates before the debts were paid, as the heirs have done in the Kittredge succession, and the law has provided for this case, and funds are set apart to pay the debts, or the heirs are charged with them according to their virile shares.

Code 1870, Arts. 1289, 1292, 1307, 1311, 1312; Code 1825, Arts. 1215, 1216, 1230, 1234, 1235.

Stephen K. Fowler vs. Succession of Gordon, 24 A. 270.

Sevier vs. Sargent, 25 Ann. 221.

Martin vs. Cannon, 25 Ann. 225.

The mode of proceeding is provided by Arts. 1356,

1359, 1363, 1364, 1365, Code 1825, Arts. 1278, 1281, 1285, 1286. One of the directions to the notary, in making the partition, is, (Art. 1359 of the C. C. 1870) to make deduction, 1st. "Of the sums due to one or more of the heirs for a debt due them by the deceased, or advance made to the succession or expenses on its effects according to the account settled among the heirs."

Such being the law, and the compromise, as we have pleaded in the petition, having fixed " a basis of *settlement* of the interest of said parties of the first part in and to the succession of said Dr. E. E. Kittredge, deceased, and as a mode of settling and liquidating the same," etc., which is a partition, as we have shown, it is manifest that the judgment rendered in this case is the precise jndgment which right, and justice, and the circumstances of the case require. No other one would cover the whole case.

The estate is legally bound for the whole debt, and the judgment is against the administratrix.

The widow is legally bound for one-half of the same debt, and the judgment is rendered accordingly.

With the plaintiff there are eleven heirs, and the judgment is recognized against the minors for their *pro rata* with the benefit of inventory, and that they cannot again contest the debt. It is true that they and the widow contracted, in the compromise, to pay the whole debt, (see Appendix,) but the judgment is according to the obligations as established by law.

It seems to us that the writ of error has been taken

as an experiment, to see if the party cannot obtain a longer delay for the payment of a just debt.

The critical objections raised in this court on the writ of error were not thought of in the lower court.

The *administratrix* and *tutrix* did not object to being sued in the same suit for a debt which a co-heir was seeking to recover. The exception, and the only exception, for these two persons was, that the debt was barred by prescription, and that there was a suit in equity pending for the same cause of action. Printed Record, page 4.

The widow in community, so far from objecting to being sued with the administratrix and tutrix, excepted on the three grounds: that the petition did not disclose any cause of action against her, that the debt was barred by prescription, and there was a suit in equity pending for the same cause of action. Page 6.

And then, in her several capacities, she answers the whole case generally.

These issues (by a trial on the merits) merely raised the question of indebtedness of the defendants to the plaintiff; and the issue being decided in favor of the plaintiff, the judgment followed as a matter of course.

The indebtedness being conceded, it will be difficult for the counsel for the plaintiff in error to show any injury done by the judgment in this case. As *administratrix*, the widow is bound only to the extent of the assets in her hands. C. P. 987, 988. As widow in community, she is bound for one-half of the debt, and

she cannot complain (now that she has failed in her defences pleaded) that she is decreed to pay what she owes as an individual in a suit where she can discharge her individual debt by paying it out of such assets as she may have as administratrix; and the minors are not injured, because they are not personally bound—only bound with benefit of inventory, and it would be unjust that they should partition the estate as they are seeking to do, without setting apart to the co-heir what is needed to pay her debt.

C. C. 1047, 1051, 1281, 1290. Marget vs. Pate, 2 A. 486.

Monget vs. Pate, 3 A. 270, and decree.

Collins vs. Babin, 16 A. 291, and decree.

Flood vs. Shambrough, 3 N. 632.

LEGAL PROPOSITIONS.

Our case rests on these undeniable propositions:

First. Until the estate has been delivered to the heirs by the order of the probate court, in the partition or otherwise, the heir, as well as any other creditor, has the undoubted right to have her claim against the estate liquidated contradictorily with the administratrix, by a judgment.

Second. Whenever the widow in community has accepted the community by any act which binds her, the creditor, whether an heir or not, has a legal demand

against her personally for one-half of the community debt, which he may enforce against her.

THIRD. Whenever the heirs, whether major or minor, take steps, whether by compromise or otherwise, to make a partition of the estate, the co-heir who is a creditor of the estate has a right to have her demand against the estate *which is disputed by them* liquidated by a judgment.

FOURTH. In all cases in Louisiana, where two or more persons are debtors for the whole or parts of the same debt, they may be sued in one action.

FIFTH. But if the last proposition were not true in all cases, the party who would complain of a misjoinder of parties, should except, *on that ground*, A LIMINE LITIS, and cannot be heard after answer to the merits and judgment on the issues she has made.

SIXTH. The judgment in this case, in the form in which it is rendered, is the precise judgment required to settle the rights of the parties in partition, which the widow and other heirs have commenced, to the exclusion of defendant in error, as shown by the contest which they have raised by the denial of her rights. And the defendant is entitled to be paid out of the assets of the community, (whether they be,) in the hands of the administratrix or the heirs making partition. A judgment against the succession or one against a party in her

capacity of administratrix, or against her as administratrix, is the same thing.

So a judgment against one as tutrix, or in her capacity of tutrix, is the same as one against the minors she represents, and these and other forms are used in Louisiana, a country of the civil law, where the substance of things are regarded more than forms.

E. T. MERIRCK,
Counsel for Defendant in Error.

APPENDIX.

JOSEPH K. G. KITTREDGE ET ALS.

WITH

MRS. ANN E. KITTREDGE, WIDOW IN COMMUNITY WITH DR. E. E. KITTREDGE, TUTRIX, ETC., ET ALS.

Compromise and Agreement in matter of settlement of Succession of Dr. E. E. Kittredge.

UNITED STATES OF AMERICA,
The State of Louisiana, Parish of Assumption.

Be it remembered that on this, the twenty-first day of the month of March in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States of America the ninety-fourth—

Before me, Nicolas A. Pintado, recorder and ex officio notary public in and for the parish of Assumption, State of Louisiana, duly qualified, commissioned and sworn, and in the name of the hereinafter named and subscribing witnesses—

Personally came and appeared, as parties of the first

part: 1st, Joseph K. G. Kittredge; 2d, Mary Ann Whittington, wife of Joseph B. Whittington, and by her said husband, Joseph B. Whittington, herein duly authorised and assisted; 3d, Mary Louisa Jones, wife of George W. Jones, and by her said husband, George W. Jones, herein duly authorized and assisted, all of the parish of Assumption, State of Louisiana; and 4th, Eliza Josephine Ewing, wife of Fayette Clay Ewing, and by her said husband, Fayette Clay Ewing, herein duly authorized and assisted, both of the parish Lafourche, State of Louisiana; and as parties of the second part: 1st, Mrs. Ann E. Kittredge, widow of Dr. E. E. Kittredge, deceased, and herein acting in her own right as widow in community and in her representative capacity as tutrix of her minor children, issue of her marriage with her said deceased husband, E. E. Kittredge, of the parish of Assumption, State of Louisiana; 2d, Emma Sims, wife of R. N. Sims, and by her said husband, R. N. Sims, herein duly authorized and assisted, both of the parish of Ascension, State of Louisiana, and Jessie A. McNeil, wife of E. B. McNeil, of the county of Tishemingo, State of Mississippi, herein represented by her duly authorized and constituted agent and attorney in fact, Daniel Webster Kelly, of the parish of Assumption, State of Louisiana, said Mrs. McNeil in said power duly authorized and assisted by her said husband, E. B. McNeil: all of said parties named as principal heirs of said E. E. Kittredge—who declared:

That whereas the said E. E. Kittredge has been twice

married and left children, issue of each marriage and a surviving widow in community, and whereas, the children of the first marriage set up rights as such under the first marriage, and there are claims for improvements made by the widow in community on the separate property of the deceased, all of which claims, if litigated, will embitter the members of the family among each other, eat up the substance of the succession, and after all, would doubtless be adjudicated upon by the court upon imperfect data and speculative estimates; and whereas this would be a matter much to be deplored, if possible to be avoided by a spirit of mutual concession; now, therefore, to attain that object, and for the purpose of settling amicably and compromising the difference which might arise between the parties, this agreement is made:

1st. Nothing herein contained shall be intended, held or construed as being a waiver, abandonment or relinquishment of any right of any parties hereto, so as to operate or enure to the benefit of any person not a party to this agreement; on the contrary, all the parties hereto agree to stand upon strict legal rights and enforce the same if necessary, so that its enforcement may enure to the benefit of the parties to this act and in furtherance of the intention and objects herein contained.

2d. It is agreed that there shall be a sale by licitation for the purpose of proceeding to a settlement of the succession of Dr. E. E. Kittredge, all the property to be sold at auction save Glenwood plantation, its

improvements, stock, working implements, appurtenances, etc., for which special provision is herein made. That at said sale the following property shall be bid in if possible by the following parties, at the following prices, to wit:

Elm Hall plantation intact as it now stands, including all the buildings, machinery and improvements of every kind thereon, cane, corn, live stock of every description, farming utensils, working implements, and in general all and everything thereunto belonging to and appertaining, by Mrs. Kittredge, for herself and such of her children, if any, as may wish to purchase at the price of one hundred and sixty thousand dollars.

The city house and lot, by the same parties, for the sum of six thousand dollars.

The city lots, by the same parties, for the sum of four thousand eight hundred dollars. The Tennessee Springs, by the same parties, for the sum of nine thousand dollars. The Concordia lands, by the same parties, for the sum of fifteen hundred dollars; and the Mississippi lands, by the same parties, for the sum of ten thousand dollars. One-half of the Raceland Plantation, intact as it now stands, including one-half of all the buildings, machinery and improvements of every kind thereon. One-half of the cane, corn, live stock of every description, farming utensils and working implements, and in general one-half of all and every thing and thereunto belonging and appertaining, by Dr. F. C. Ewing, for the sum of fifty thousand dollars; and one-half of Ariel Plantation,

intact as it now stands, including one-half of all buildings, machinery and improvements of every kind thereon, corn, cane, live stock of every description, farming utensils and working implements, and in general one-half of all and every thing thereunto belonging and pertaining, by Mrs. Eliza Josephine Ewing, wife of Dr. F. C. Ewing, for the price and sum of fifteen thousand dollars.

3d. That said parties shall bid for said property for said prices, and said parties to this agreement shall not bid against them as bidders beyond that price; and in the event said properties at said sale should have to be bid off by said purchasers for a larger amount than said prices, the parties to this act shall not demand from said purchasers any of the excess.

And now, as a basis of settlement of the interest of said parties of the first part in and to the succession of said Dr. E. E. Kittredge and as a mode of liquidating, paying and settling the same, it is hereby covenanted and agreed—

First. That the following debts due by the succession of said E. E. Kittredge shall be assumed or placed at the charge of the parties of the second part, and said parties of the second part warrant and guarantee said parties of the first part against all liabilities from the same. viz :

1st. A debt of about eleven thousand dollars due Olivia Corinne Race, wife of George W. Race, balance due her from her mother's succession.

2d. An indebtedness to Mrs. Ann Ford, wife of Dr.

Joseph D. Ford, as security for J. W. Pike, amounting to about the sum of eight thousand dollars.

Second. That the following property of and claim due the succession shall be, the first the property of and the second enure to the benefit of, the parties of the secoud part:

The property named is stock in the steamboat Henry Tete, for the sum of seven hundred and fifty dollars.

The claim referred to, to be paid as hereinafter provided, is the claim for amount, to be shown hereafter by account, advanced by the succession of Dr. Kittredge to Kittredge & Ewing since the doctor's death, the one-half of which is due by Ewing.

Third. The interest of the party hereto, Mrs. Eliza Josephine Ewing, wife of Dr. F. C. Ewing, in and to the succession of her deceased father, Dr. E. E. Kittredge, under the terms of this agreement, is hereby fixed at the sum of twenty thousand dollars.

This is to be paid as cash by the price of the half of Ariel plantation, with its buildings, machinery, cane, corn, working implements, live stock, etc., as herein recited, to be sold to Mrs. Ewing.

And the balance to be attributed to the price of half of Raceland plantation, with its appurtenances, buildings, imrovements, machinery, corn, cane, live stock, etc., as herein recited, to be sold to Dr. F. C. Ewing. This done, there remains due to the succession of Dr.

E. E. Kittredge on the price of the half of Raceland plantation and appurtenances, a balance of fifty thousand dollars, and an additional sum of thirteen thousand dollars, more or less, to be fixed hereafter by account, and amount not now known and which amount, when so fixed, is to be a full, final settlement and liquidation of all demands and reclamations whatsoever against Dr. F. C. Ewing and his wife in favor of the succession of said E. E. Kittredge.

These amounts are to be paid as follows: 1st. The assumption of one-half of such amount as may be due to Henry Tete, supposed to be about the sum of twenty thousand dollars, and one-half of which is due by said succession of Kittredge, and a sum which, added to the said assumpsit of the portions due by said succession, will equal one-half of the whole of said Ewing's indebtedness, which is, say twenty-three thousand dollars or thereabouts to be paid in twelve months, and the remaining half of said indebtedness in twenty-four months. These balances, after being further reduced by crediting Dr. F. C. Ewing on the same with the one-half of the money advanced by him, but belonging to his children, the whole amount being about the sum of five thousand three hundred dollars, to be represented by first mortgage paper on Raceland plantation.

Fourth The interest of Mrs. Mary Ann Whittington, wife of Joseph B. Whittington, in and to the succession of her deceased father, Dr. E. E. Kittredge,

under the terms of this agreement, is hereby fixed at the sum of twenty thousand dollars. This amount is to be paid her as follows: the sum of fifteen thousand dollars as cash as the purchase price of one-half of Ravenswood plantation intact as it now stands, including the one-half of all buildings, machinery and improvements of every kind thereon, and one-half of the cane, corn, live stock of every description, utensils, working implements, and in general everything thereunto belonging and appertaining on the day of the partition sale of half of said plantation and appurtenances, made at the suit of Joseph K. G. Kittredge vs. Mrs. Ann E. Kittredge et als., of which she became a purchaser for the sum of nine thousand seven hundred and fifty dollars, the difference between the amount bid at said sale and said sum of fifteen thousand dollars, viz.: the sum of five thousand two hundred and fifty dollars, being granted by her in reduction herein on her hereditary portion solely as a matter of compromise and for the purpose of effecting this settlement, hereby reserving her right to enforce her strict legal claims in the event this compromise and agreement should be invalidated or not carried into effect, particularly so far as said sale and purchase of one-half Ravenswood plantation, appurtenances, etc., aforesaid, is concerned. And all of the parties to this act, in consideration of this agreement and covenant, do hereby formally ratify and approve said sale and purchase of one-half of said Ravenswood plantation, etc., as aforesaid in all its parts, and moreover, guarantee

and warrant to said Mrs. Mary Ann Whittington her title to the same. The balance of said Mrs. Mary Ann Whittington's hereditary portion to be paid her in the first mortgage paper on Raceland plantation, to be furnished to the parties of the second part by Dr. F. C. Ewing, in payment of balance due by him, due in twelve months.

Fifth—The interest of Joseph K. G. Kittredge, in and to the succession of his deceased father, Dr E. E. Kittredge under the terms of this agreement, is hereby fixed at the sum of twenty thousand dollars, this amount is to be paid him in this wise: In deduction he is to collate the sum of one thousand eight hundred and forty-eight 16-100 dollars, being the amount of a donation of indebtedness made to him by his father of the sum of seventeen thousand and forty eight 16-100 dollars, less the one-half of the value of slaves sold by Dr. E. E. Kittredge to said Joseph K. G. Kittredge, and which is the basis in part of said indebtedness so collated as aforesaid; said slaves being numbered thirty-one and estimated as worth in all the sum of fifteen thousand two hundred dollars. And it appearing from account of Kittredge & Kittredge, as shown by tableau homologated in succession, and by accounts of said partnership since up to date of dissolution by sale of succession of half Ravenswood Plantation, that the same is about balanced, and that there is no reclamations for and against either partner arising from same; the balance of the hereditary portion due Joseph

K. G. Kittredge under the agreement, viz: the sum of eighteen thousand one hundred and fifty-one 89-100 dollars, to be paid him in the first mortgage paper on Raceland Plantation, to be furnished to the parties of the second part, by Dr. F. C Ewing, in payment of balance due by him, one half of paper due in twelve months, the other half in paper due in twenty-four months.

Sixth.—The interest Mary Louisa Jones in and to the succession of her deceased father, Dr. E. E. Kittredge under the terms of this agreement. is hereby fixed at the sum twenty of thousand dollars, this amount to be paid to her in this wise: Glenwood Plantation, as it now stands, including all buildings, machinery and improvements of every kind thereon, cane, corn, live stock of every description, farming utensils and working implements, and in general all and everything thereunto belonging and appertaining, is to be conveyed to her in full property by the parties hereto, so far as their interest is concerned, at the price and sum of twenty-one thousand five hundred and ninety-three 52-100 dollars; of this price she pays her said portion and inheritance, said sum of twenty thousand dollars, leaving due by her said price of sale one thousand five hundred and ninety-three 52-100 dollars, of which she for this and for collation hereinafter named, the sum of twelve hundred and three 05-100 dollars, being one twenty-fourth of twenty-eight thousand eight hundred and seventy-three 32-100

dollars, retained to pay Mr. Race her interest as herein in said Glenwood Plantation and said collation. Said Mrs. Jones collates and pays to said parties of the second part, as cash, the amount acknowledged by her to be so subject to collation, the sum of seven thousand two hundred and seventy-nine 86-100 dollars.

This agreement, so far as the interests of the minors herein are concerned, to be ratified and approved by a family meeting, to be carried into effect without any unnecessary delay by a suit in partition and other proper acts and proceedings, at the expense of all parties concerned, and all parties hereto shall assist therein.

The above agreement relates solely to the property therein mentioned and described, all the parties hereto reserving their rights to their shares of any other property that may belong to the succession of Dr. E. E. Kittredge, other than that enumerated herein.

Five words interlined approved before signing.

This done, read and signed at my office, in the village of Napoleonville, Parish of Assumption, State of Louisiana, on the day, month and year first above written, in the presence of Alfred Tete and Frank K. Comeau, competent witnesses of lawful age, who have signed these presents, together with the parties hereto, and me, said Recorder undersigned, after due reading of the whole.

These words interlined approved before signing. Internal revenue stamps of the United States of the value

of fifteen cents hereto annexed and affixed and cancelled before signing.

"Signed :" Jos. K. G. Kittredge. Mary Ann Whittington. Joseph B. Whittington, for the purpose of authorizing and assisting his wife. Mary Louisa Jones. For the purpose of authorizing and assisting his wife, Geo. W. Jones. Eliza J. Ewing. For the purpose of authorizing and assisting his wife, F. C. Ewing. Ann E. Kittredge, widow and tutrix. Jessie A. McNeil, per pro D. W. Kelly. Emma Sims. R. N. Sims, for the purpose of authorizing his wife.

Alfred Tete. Frank Comeau.

N. A. Pintado, Recorder.

Recorded March 25th, 1870.

" " " .

" " "

"Three words erased null." "One letter erased null."

RECORDER'S OFFICE,
Parish of Assumption.

A true copy from the original Records on file and of record in my office.

In faith whereof, I grant these presents under my hand and seal of my office, this the 13th day of April, A. D., 1870.

[Signed] N. R. PINTADO,
Recorder.

Filed May 2nd, 1870.

[Signed] JOHN K. DURNO,
Clerk.

Office of the clerk of the Circuit Court of the United States, for the Fifth Circuit and District of Louisiana. I hereby certify that the foregoing act of compromise was offered, received and filed in evidence, marked "A," on behalf of the plaintiff in suit No. 6799, entitled Mrs. O. C. Race, &c., vs. Mrs. Ann E. Kittredge, &c., on the trial thereof on the 13th May, 1873.

[Signed] F. B. VIGNOT,
Dy Clerk.